REPORT **FI-02-21**

THE NOVA SCOTIA FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

A REQUEST FOR REVIEW of a decision of the **PETROLEUM DIRECTORATE** to deny access to royalty forecasts for the Sable Offshore Energy Project.

REVIEW OFFICER: Darce Fardy

REPORT DATE: May 8, 2002

ISSUE: Whether the yearly breakdown of projected royalty figures from the Sable Offshore Energy Project is exempted from public disclosure by **Sections 14(1), 17(1) and 21(1)** of the **Act**.

In a Request for Review under the **Freedom of Information and Protection of Privacy Act** (the **Act**), dated February 11, 2002, the Applicant asked that I recommend to the Nova Scotia Petroleum Directorate that it reverse its decision to deny him access to the information with respect to royalty forecasts for the Sable Offshore Energy Project (SOEP).

The Application followed an exchange of e-mails between the Applicant and the Directorate in a quest for "a yearly breakdown of actual (the previous year's) and anticipated net royalty revenues from Sable." The Applicant was provided with the actual revenue for the year 2000 ($7 million) and forecasts for 2001 ($12 million) and 2002 ($9

million) as well as the forecasted revenue for the total project ($1.6 to $2.3 billion). When he then asked for the yearly breakdown that led to the projected total he was told that government did not release that information. A formal application for access to the information followed.

The Applicant was told his application was being partially granted and he was provided with two documents which were severed of information in accordance with the exemptions found in **ss.14(1), 17(1)(b)(d)** and **(e)** and **21(1)** of the **Act**. The Directorate also cited **s.32(1)** of the *Offshore Petroleum Royalty Regulations* and **s.22(b)** of the *Offshore Petroleum Royalty Act*.

The cited sections of FOIPOP are:

S.14 (1) The head of a public body may refuse to disclose to an applicant information that would reveal advice, recommendations or draft regulations developed by or for a public body or a minister.

S.17 (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the Government of Nova Scotia or the ability of the Government to manage the economy and, without restricting the generality of the foregoing, may refuse to disclose the following information:

(b) financial, commercial, scientific or technical information that belongs to a public body or to the Government of Nova Scotia and that has, or is reasonably likely to have, monetary value;

(d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss of gain to a third party;

(e) information about negotiations carried on by or for a public body or the Government of Nova Scotia.

S.21 (1) The head of a public body shall refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of a third party;

(b) that is supplied, implicitly or explicitly, in confidence; and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of a third party,

(iv) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(v) result in undue financial loss or gain to any person or organization, or

(vi) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour-relations dispute.

Section 22(b) of the *Offshore Petroleum Royalty Act* addresses the Minister's powers and 32(1) of the *Offshore Petroleum Royalty Regulations* deals with obligations for confidentiality.

The Directorate explained that its annual royalty forecasts are made available to the Department of Finance and incorporated in the Budget Estimates and the Year End Forecast Updates, "all of which are public documents."

It was learned during the Review Office's mediation process that the main issue for the Applicant is the refusal of the Directorate to disclose the annual projected

royalty payments the government can expect from SOEP to the year 2030. The Directorate normally discloses the current and following year's projections only.

During the Review both parties were provided with opportunities to put forward their argument in written submissions and at a hearing held by the Review Officer.

The Directorate wrote a lengthy representation in support of its decision. With respect to s.14(1), the Directorate believes the severed information contains "advice" or "recommendations". . . "in the form of projections to a public body or a Minister" and is therefore exempt from disclosure. With reference to **s.14(2)**, which requires a public body to disclose "background" information which was used to support the "advice," the Directorate maintains that the information does not contain any background information. Noting that **s.3(1)(a)** provides a definition for "background information" which includes an "economic forecast," the Directorate argues that the information is not an "economic forecast" because it provides only an "indication of project profitability."

With respect to s.21(1), the Directorate, recognizing that all three subsections must apply (the three-way test), believes the first test is passed because the information contains "capital costs, operating costs and project pricing of each of the five SOEP Producers" and would, therefore, reveal "commercial" and "financial" information.

Section 32(1) of the *Offshore Petroleum Royalty Regulations* was cited to show proof that the information was provided to the public body in confidence (second test).

The Directorate argues the third test is met because disclosing the royalty projections would allow one producer to calculate the expected profitability status of another producer and thus harm their competitive positions.

The third exemption claimed by the Directorate was s.17(1) (b), (d) and (e). The Directorate's case, in my view, rests on this exemption.

The Directorate's case on s.17:

1. The government will have future negotiations with the SOEP producers which will involve royalty payments as the end of the project approaches. Royalties may need to be renegotiated if the government wishes to encourage producers to keep the project going.

2. If the parties know the royalty figures they can, by deduction, gain knowledge about the province's price assumptions and expectations which could cause them to revise operation plans to their advantage. Premature revision of the royalty arrangements payable at the end of the project would likely cause significant financial damage to the province.

3. Disclosing the estimated yearly royalty projections over the course of the project could allow third parties to figure out potential yearly events, be it the advancement of Tier II fields before they are announced, changes to project costs and/or resource expectations, or prices a competitor may be getting annually for its products.

4. The government says it regularly receives confidential information from SOEP producers which is used to validate royalties payable to date, as well as future expected royalties. The information is also used to determine each producer's financial position with respect to SOEP. Releasing yearly project projections would mean that producers would have advance knowledge of when the project would be in its most

profitable stages or alternatively, when problems may be appearing on the horizon. Knowledge of this information could result in unfair loss or gain to a third party.

5. Releasing the figures could also bring undue gain to other oil and gas producers who compete with the SOEP producers.

6. The government's interests will be harmed if SOEP knows when a slowdown is expected because SOEP may have a different idea of when a slowdown should start and may try to negotiate reduced royalties.

The Applicant's case:

The Applicant also made written representations and presented oral arguments. His main points are:

1. It is not reasonable to assume that a producer could glean so much information from the royalty figures.

2. Since pricing assumptions change over time there is little future negotiating value to the producers during negotiations if the present pricing assumptions are revealed through the disclosure of royalty figures.

3. Releasing previously projected royalty figures has already revealed when the province was considering rolling back the royalty scheme in order to keep the project going.

4. Because the government uses royalty projections for its budget projections it is impossible to debate the budget estimates without knowing the royalty projections.

5. There is enormous public interest in the royalties because they are "the only major new sources of revenue available to government. . . ."

6. The government has not proven that there is a reasonable expectation of harm if the royalty figures are disclosed.

Conclusions:

As noted earlier, it is my view that the decision of the Directorate must be argued on s.17(1) and its various subsections.

Describing a list of figures as "advice" [s.14(1)] is giving the word a meaning well beyond its general use. I agree with the Ontario Information and Privacy Commissioner that advice must contain more than information--it must relate to a course of action. What the Applicant wants are figures related to the offshore oil and gas royalties contained in one column of a 10-column fiscal projection.

Although the Directorate cited s.21(1), it did not notify the producers as "third parties" nor did it provide convincing evidence that the disclosure would harm the third parties' interests. Its arguments were largely confined to supporting its view that disclosing the lone column of figures the applicant wants could reasonably be expected to harm the financial and economic interests of the government, not the third parties.

Section 45(1) places the burden of proof on the Directorate. Under s.17(1) it must convince the Review Officer that there is a reasonable expectation of harm to the financial or economic interests of the province if the royalty figures are disclosed. Under s.17(1)(b) it must also prove that the royalty figures contain financial information belonging

to the province which is likely to have monetary value. Under s.17(1)(d) it must prove that disclosure would result in undue financial loss or gain to a third party. Finally, the directorate must prove that the royalty figures contain information about negotiations carried on by or for a public body [s.17(1)(e)].

The Directorate developed and disclosed a royalty chart dated 1998. The Applicant says this means the companies involved in the project already are aware of when the government will consider rolling back the royalty scheme to keep the project running. The Directorate says the present anticipated rollback year is not the same as indicated in the 1998 figures because of changes in various factors since then. The Applicant argues that any changes support his argument for disclosing the figures at this time, since it is obvious the numbers change over time and the government would be unlikely to be concerned about figures arrived at and disclosed in 2002 when it considers a rollback twenty years down the road. In response, the Directorate said the government wants to avoid giving any interested owner a sense of when the project will end because it could advantage industry at the government's expense.

The Directorate believes it would be setting a precedent in that if it disclosed the royalty figures at this time it would have to disclose them every year for the next twenty years or more. Creating a precedent is not an exemption under the **Act**. The Directorate need only address the application before it, just as this Review addresses only the facts and evidence before it on this specific request. Evidence and arguments may change in the future.

During the hearing, the Directorate raised, for the first time, the over-ride provisions of the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act*. **Section 4A(2)** of the FOIPOP Act lists sections of other legislation which prevail over FOIPOP. It includes **subsection 121(2)** of the *Accord.* It is my view that this subsection does not apply to the information sought because it is designed to protect specialized technical information which offshore companies provide to the government. The royalty figures were calculated by the government itself.

As I noted above, the Directorate has to prove there is a reasonable expectation of harm to the government from disclosure of the royalty figures beyond those regularly provided for the present and coming year. In other Reviews I have quoted the Ontario Information and Privacy Commissioner that the alleged harm "must not be fanciful, imaginary or contrived but rather one that is based on reason" (Order 203). The British Columbia Commissioner believes "it must be possible for a reasonable person to conclude, based on the evidence, that an identified, or specific, harm to the financial or economic interests of the public body is likelier than not to flow from disclosure of the information" (Order No. 324-1999).

My conclusion rests on whether I am satisfied the Directorate has met the burden of proof. Questions that arise include:

1. Has the Directorate identified the harm?
2. Is it reasonable to conclude that the oil and gas companies could glean so much information from disclosure of the royalty projections that they would gain a negotiating advantage?

3. Is there persuasive evidence that harm is likelier than not to occur following the disclosure of the projections?

4. Did the disclosure of the royalty figures of 1998 nullify the Directorate's case?

5. Would a reasonable person conclude that disclosure of the royalty figures to the oil and gas companies could harm the government's interests?

The Directorate has not proven that s.17(1)(e) exempts the royalty projections from disclosure. The projections contain information resulting from negotiations but are not about negotiations.

It may be arguable that the royalty projections have monetary value [s.17(1)(b)] but a public body can make its case by citing only s.17(1). Examples provided in the subsections do not "restrict the generality" of s.17(1).

The Directorate, in claiming that the government's negotiating position would be undermined, has clearly identified the specific harm that it claims would follow disclosure of the royalty projections.

While proof is seldom positive I am satisfied, with the evidence presented, that it is reasonable to conclude that the oil and gas companies, with the resources available to them, could glean enough information from the projections that harm to the government's interests would be likely to happen.

The Applicant argued that because the 1998 royalty projections were revealed, there could be no argument that harm could occur by disclosing the projections at issue in

this Review. The Directorate, which believes the release of the 1998 projections was a mistake, argued that the latest projections, four years later, are much closer to the true situation and may be of more benefit to the oil and gas companies than the 1998 ones. While both these arguments have merit I am satisfied that it is likelier than not, given the arguments of the Directorate, that the government's negotiating position could be compromised if the requested information were disclosed.

It is my view that the Directorate's decision to deny access to the royalty projections is supported by s.17(1).

Dated at Halifax, Nova Scotia on May 8, 2002

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Darce Fardy, Review Officer